

August 3, 2012

Marlene H. Dortch Secretary Federal Communications Commission 445 12th St. SW Washington, DC 20554

Re: WT Docket No. 12-4, Proposed Assignment of Licenses to Verizon Wireless from SpectrumCo and Cox TMI Wireless Notice of *Ex Parte* Meeting

Dear Ms. Dortch:

On August 2, 2012, Jodie Griffin, Staff Attorney, John Bergmayer, Senior Staff Attorney, and Carrie Ellen Sager, Legal Intern, of Public Knowledge (PK) met with Paul Murray, Holly Saurer, and David Goldman of Commissioner Rosenworcel's office.

PK discussed the competitive harms that would result from approval of the Verizon Wireless, SpectrumCo, and Cox applications, previously detailed in both our *Petition to Deny*¹ and *Reply Comments*.² The harms that would stem from the agency, reseller, and Joint Operating Entity (JOE) agreements necessarily mean that the applications cannot be in the public interest, and so the applications should only be approved upon agreement that the Applicants will rescind the commercial agreements. However, should the Commission permit the agreements to stand, certain conditions would be necessary to reduce the extent to which the agreements would harm the public interest. PK noted that these conditions must be flexible in order to protect against harmful conduct that the Commission cannot yet specifically anticipate, and must also prohibit specific behaviors that are harmful to the public interest.

At their core, the proposed agreements represent the creation of the communications cartel of the next ten to fifteen years. [BEGIN HIGHLY CONFIDENTIAL]

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fact that these companies maintain significant levels of control—40% of the wireless market, 40% of the residential broadband market, and 40% of the residential video market—means it will be a cartel with clout. Using the intellectual property they develop, the Applicants will be able to impose their own proprietary standards on the market—something Comcast has already shown itself to be particularly adept at.

¹ See Petition to Deny of Public Knowledge et al., WT Docket No. 12-4 (Feb. 21, 2012).

² See Reply Comments of Public Knowledge et al., WT Docket No. 12-4 (Mar. 26, 2012).

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The Applicants themselves have effectively admitted that these agreements mark the end of their attempts to directly compete with each other. For example, on one conference call Time Warner Cable stated that instead of competing with Verizon, it will offer enriched offerings available only to those who have dual subscriptions to both Verizon and Time Warner Cable.³ The proposed agreements are the vessel for the Applicants' promises to work together instead of competing, to the detriment of consumers who benefit from robust competition in the marketplace.

PK reminds the Commission that competition from companies like Apple are no competitive counterweight to the Applicants' collusion, since this type of competitor would be no match for the increased market power that Verizon and Comcast will gain through these transactions. Companies that control only content or only transmission paths will still in some way be dependent upon the Applicants, who will jointly control both conduit and content, and who [BEGIN HIGHLY CONFIDENTIAL]

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CONFIDENTIAL] Comcast in particular, which owns NBCUniversal, several cable networks, and a vast wireline Internet access service infrastructure, would face no meaningful competition from companies like Apple.

Public Knowledge has previously explained in detail how the commercial agreements will stunt the development and use of technologies like WiFi offload, online video, and wireless backhaul.⁴ The following conditions could take steps to alleviate some of the competitive harms inflicted by the agreements, even if they do not entirely solve the problems raised by the deals.

I. REASONABLE AND NONDISCRIMINATORY LICENSING OF THE JOE'S TECHNOLOGY

If the JOE Agreement is allowed to stand, the JOE Members must not be allowed to anticompetitively leverage the JOE's patents and other intellectual property against competitors. Particularly considering the market share of the JOE's Members, the technology that results from

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³ See Steve Donohue, *How will Time Warner Cable and Verizon Wireless innovate?* FIERCECABLE (Apr. 26, 2012), http://www.fiercecable.com/story/how-will-time-warner-cable-and-verizon-wireless-innovate/2012-04-26.

⁴ See Comments of Public Knowledge, WT Docket No. 12-4 (July 10, 2012), available at http://apps.fcc.gov/ecfs/comment/view?id=6017090909; Letter from Harold Feld, Senior Vice President, Public Knowledge, to Marlene Dortch, Secretary, FCC, WT Docket No. 12-4 (June 22, 2012), available at http://apps.fcc.gov/ecfs/comment/view?id=6017090909; Letter from Harold Feld, Senior Vice President, Public Knowledge, to Marlene Dortch, Secretary, FCC, WT Docket No. 12-4 (June 19, 2012), available at http://apps.fcc.gov/ecfs/comment/view?id=6017039460; Letter from Harold Feld, Senior Vice President, Public Knowledge, to Marlene Dortch, Secretary, FCC, WT Docket No. 12-4 (May 18, 2012), available at http://apps.fcc.gov/ecfs/comment/view?id=6017036172; Letter from Harold Feld, Senior Vice President, Public Knowledge, to Marlene Dortch, Secretary, FCC, WT Docket No. 12-4 (Apr. 30, 2012), available at http://apps.fcc.gov/ecfs/comment/view?id=6017033654; .

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the JOE's operations will likely become a *de facto* standard in an area of increasing importance in the next generation of communications infrastructure: seamlessly integrating wireline and wireless services. It is crucial that the Applicants are prevented from leveraging this technology to shut out competitors or would-be competitors that are outside of the JOE's club.

Accordingly, PK urged the Commission to impose conditions that would diminish the anticompetitive effects of the JOE's control of must-have patents and other intellectual property. These terms should apply with regard to all prospective licensees, and should apply to all patents owned or controlled by the JOE. The JOE should also be prohibited from receiving exclusive licenses to any patents unless it has the right to sublicense those technologies on reasonable and nondiscriminatory (RAND) terms to third parties. The JOE must make these licenses available for any of its existing patents, and the JOE would be directly responsible for ensuring the administration of licenses on RAND terms to licensees.

A RAND condition would not deprive the JOE and its Members of the legitimate fruits of their labors. The JOE would still receive reasonable payment for licenses to use its technology. The RAND condition would simply ensure that the JOE's technology is not used as a bottleneck to thwart competition in the market.

a. Reasonable Licensing Terms

Any condition that requires licensing on RAND terms must include a clear definition as to what the standard requires. In order to ensure that such a condition is effective, the Commission should specify what is necessary for compliance by incorporating a well-understood and existing definition for what meets the RAND standard. Existing definitions have been recently discussed by both the Department of Justice⁵ and the Federal Trade Commission⁶ and should be considered by the Commission when implementing any condition on licensing.

As part of the RAND condition, the JOE must be required to license its technology on terms that are not anticompetitive and would not be considered unlawful if imposed by the dominant firm in a market. The JOE must not charge more than the marginal value of its technology over the next-best alternative for the licensee, and the fees for the JOE's licenses must be relative to the proportion of the licensed technology to the total patented technology necessary for the

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⁵ Regarding "Oversight of the Impact on Competition of Exclusion Orders to Enforce Standards-Essential Patents" before the S. Comm. on the Judiciary, 112th Cong. (2012) (statement of Joseph F. Wayland, Acting Assistant Attorney General, Antitrust Division), *available at* http://www.justice.gov/atr/public/testimony/284982.pdf.

⁶ Regarding "Oversight of the Impact on Competition of Exclusion Orders to Enforce Standards-Essential Patents" before the S. Comm. on the Judiciary, 112th Cong. (2012) (statement of Edith Ramirez, Commissioner, Federal Trade Commission), *available at* http://www.judiciary.senate.gov/pdf/12-7-11RamirezTestimony.pdf.

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licensee's service. The JOE may not raise its rates after its technology becomes a *de facto* standard, or after the market for that technology has grown to maturity and the licensees after effectively locked-in to that technology. The JOE may, however, include reasonable and customary terms relating to the operation and maintenance of the licensor/licensee relationship, including audits, choice of law, and dispute resolution.

The JOE must make a cash-only payment option available to prospective licensees. The JOE could not, for example, require licensees to [BEGIN HIGHLY CONFIDENTIAL]

⁸ **[END HIGHLY CONFIDENTIAL]** The JOE also could not "bundle" licenses for technology that the prospective licensee wants or needs with licenses for technology that the licensee does not want.

If the JOE fails to agree on licensing terms with a prospective licensee, the JOE should be prohibited from seeking injunctive relief in an action against the prospective licensee. Even when no licensing agreement can be reached, injunctive relief should be exclusively reserved for when monetary damages cannot compensate for the injury of continued use. This condition would not prohibit the JOE from seeking damages for infringement, but would simply require that the JOE be made whole monetarily after proving its case without being permitted to entirely stop the activities of the alleged infringer.

b. Nondiscriminatory Licensing Terms

The JOE must be required to treat all licensees similarly in order to maintain a level playing field between incumbent firms and new competing entrants. To ensure the effective operation of this condition, the JOE should be prohibited from entering any contract that ensures confidentiality over license provisions that pertain to the RAND conditions of the license.

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⁷ See David Salant, Formulas for Fair, Reasonable, and Non-Discriminatory Royalty Determination, Munich Personal RePEc Archives (2007), http://mpra.ub.uni-muenchen.de/8569/.

⁸ [BEGIN HIGHLY CONFIDENTIAL]

⁹ eBay v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006).



II. NON-EXCLUSIVITY IN THE COMMERCIAL AGREEMENTS

If the transaction between Verizon Wireless and SpectrumCo is approved, the transfer should only be permitted on the condition that the parties [BEGIN HIGHLY CONFIDENTIAL] [END

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c. The Need for a Non-Exclusivity Condition

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To ensure that the parties and their potential future licensees have both the incentive and the ability to compete vigorously against each other, the parties' agreements should only be allowed to stand upon condition that they [BEGIN HIGHLY CONFIDENTIAL]

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III.SPECTRUM CONDITIONS

As the Commission considers whether to approve the proposed spectrum transfers, PK believes it is important to consider the impact of the "spectrum gap" in addition to the spectrum crunch. As the gap between the amount of spectrum controlled by the top two providers and the amount controlled by others increases, meaningful competition becomes more difficult, limiting consumer choice and preventing new competitors from entering the market. PK concludes that

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the transactions should be blocked, and strongly maintains that if they are not, conditions must be put in place to protect consumers and competition within the industries.

If the Commission approves the spectrum transfers, the Commission should require a "use it or share it" condition, which would require any spectrum left unused by Verizon by 2016 to be included in the white spaces database for use by white spaces devices. Such a condition would be a boon to technology by encouraging developers to invest in white spaces technology. The spectrum would continue to be available for use on an unlicensed basis until Verizon builds out. Implementing this as a purely mechanical system would be easy because the condition would work with the existing white spaces databases, and would have the additional benefit of preventing the need for enforcement: Verizon would send notification when they turn on the new system, and if they fail to do so, the spectrum would automatically be put into the database and made available for use.

Additionally, on the subject of spectrum aggregation, if the Commission requires divestitures of the parties, the Commission should ensure that the spectrum divested by Verizon Wireless is not simply bought by AT&T. The Commission can achieve this result by requiring Verizon Wireless to put the divested spectrum in a divestiture trust, which can then sell the spectrum only to carriers that meet certain criteria crafted to preserve competition in wireless service.

IV. ENFORCEMENT OF CONDITIONS

If these or any other conditions are to be effective, the Commission must ensure that sufficient enforcement mechanisms are in place to monitor for violations and to efficiently remedy any violations that occur. As part of its conditions on the proposed transactions, the Commission should create an open process in which parties may complain of violations of the Commission's Order. The Commission should ensure such complaints are handled expeditiously and conditions are strongly enforced to prevent any anti-consumer, anticompetitive behavior by the Applicants.

The Commission should also impose a finite term of 3-4 years on the Applicants' JOE Agreement, which will give the Commission the opportunity to assess whether the JOE Members have been using the JOE anticompetitively or otherwise stifling the development of new voice, video, and data offerings. A finite term for the JOE would also realign the Applicants' incentive to earnestly develop new technologies without the temptation to anticompetitively leverage those technologies to dominate the communications landscape.

The Commission has authority to require conditions on these transactions, even if the transactions had not involved any spectrum transfers. For example, Section 628(b) of the Communications Act provides the Commission with the ability to prohibit unfair methods of competition that prevent multichannel video programming distributors from providing programming to consumers.²⁴ Notwithstanding that existing authority, the spectrum transfer both

²⁴ 47 U.S.C. § 548.

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in this transaction and the T-Mobile/Verizon Wireless transaction²⁵ are directly related and *also* give the Commission the necessary authority to require conditions for approval.

Finally, the proposed agreements create an attributable interest under a straight reading of Section 652 and the Commission's traditional tests.²⁶ The JOE and the resale agreements create a management interest by [**BEGIN HIGHLY CONFIDENTIAL**]

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management interest is prohibited under Section 652(a) and (b). Additionally, Section 652(c) prohibits joint ventures to provide video programming or telecommunications services; [BEGIN HIGHLY CONFIDENTIAL]

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prohibited joint venture.

Public Knowledge notes that many other parties have suggested conditions to decrease the public harms flowing from the transactions. For ease of reference, PK encloses the following appendix, listing many of the conditions that have been proposed in this proceeding thus far.

Respectfully submitted,

/s/ Jodie Griffin Staff Attorney PUBLIC KNOWLEDGE

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²⁵ See Comments of Public Knowledge, WT Docket No. 12-175 (July 10, 2012).

²⁶ See Petition to Deny of Public Knowledge et al., WT Docket No. 12-4, Conf. App. A-8-A-9 (Feb. 21, 2012).